FILE COPY

Office - Supreme Court, U.
FILED
SEP 23 1949
CHARLES ELMORE CROPL
CLER

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 269.

HARRY F. RUSSELL, Judge of the Circuit Court of the City of St. Louis, Missouri,
Petitioner,

vs.

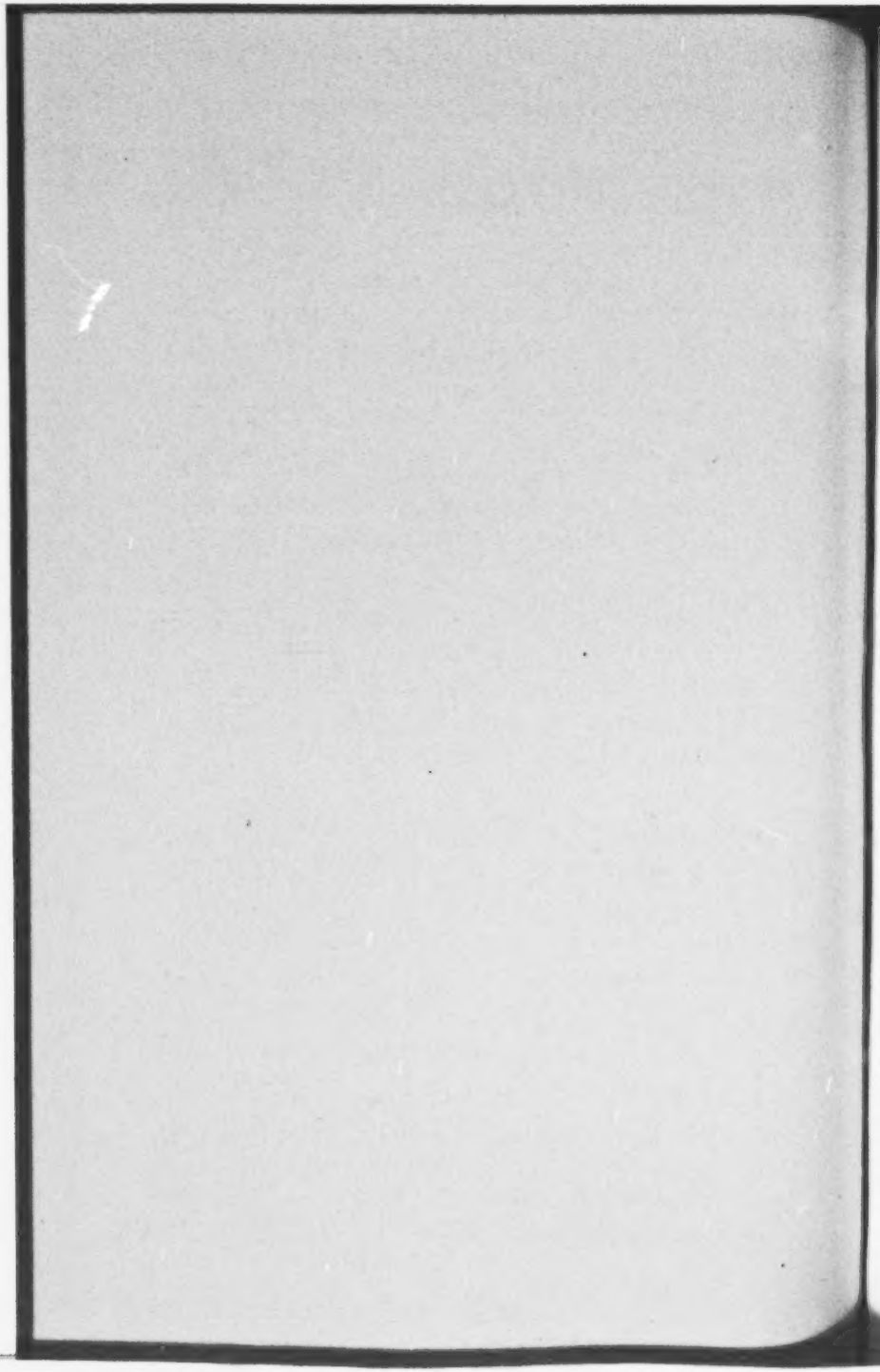
THE STATE OF MISSOURI, at the Relation of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EUGENE G. NAHLER,
CORNELIUS H. SKINKER, JR.,
ALVIN J. BAUMANN,
906 Olive Street,
St. Louis 1, Missouri,
Attorneys for Respondent, St. Louis-San Francisco Railway Company.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.



INDEX.

Page

Statement of facts 1

Points of fact and of law and grounds urged in argument in opposition to petition for writ of certiorari. 4

Argument 5

I. The Supreme Court of Missouri properly held that a jurisdictional labor dispute existed and that such dispute was not determinable by the courts 5

II. The petition is based on forebodings as to the possible decision of the National Railroad Adjustment Board if the matter is submitted to that body 10

Conclusion 13

Cases Cited.

General Committee etc. v. Missouri-Kansas-Texas R. Co. (C. C. A. 5), 132 F. 2d 91, 320 U. S. 323 ..... 4, 6, 7

Hampton v. Thompson (C. C. A. 5), 171 F. 2d 535 ..... 4, 11

Howard v. Thompson, 72 F. Supp. 695 2

Missouri-Kansas-Texas R. Co. v. Randolph (C. C. A. 8), 164 F. 2d 4, cer. den. 334 U. S. 818 ..... 4, 9, 10

Order of Railroad Telegraphers et al. v. New Orleans, T. & M. Ry. Co. (C. C. A. 8), 156 F. 2d 1, cer. den. 329 U. S. 758 ..... 4, 8

Order of Railway Conductors v. Pitney et al., 326 U. S. 561 ..... 4, 7, 9

Order of Railway Conductors v. Swan, 329 U. S. 520 ..... 4, 11, 12

Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515 ..... 4, 10

Washington Terminal Co. v. Boswell, 124 F. 2d 235, affmd. 319 U. S. 732 ..... 4, 10

Statutes.

Railway Labor Act of 1934, 45 U. S. C. A., 151 et seq.. 2, 4, 10

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. 269.

HARRY F. RUSSELL, Judge of the Circuit Court of the City of St. Louis, Missouri,
Petitioner,

vs.

THE STATE OF MISSOURI, at the Relation of ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, a Corporation,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri.

RESPONDENT ST. LOUIS-SAN FRANCISCO RAIL WAY COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

Respondent, St. Louis-San Francisco Railway Company (who will hereinafter be referred to as Frisco), is a common carrier by railroad and an employer of many crafts or classes of employes with whom it has collective bargaining agreements entered into between it and the collective

bargaining representatives of such crafts or classes pursuant to the Railway Labor Act of 1934, 45 U. S. C. A., sec. 151 et seq. Among these are brakemen and brakemen-baggagemen covered by collective bargaining agreement with Brotherhood of Railroad Trainmen (R. 18), and train porters covered by collective bargaining agreement with a union of their own choosing (Howard v. Thompson, 72 F. Supp. 695, 698, 699, 700, referred to in the decision below, R. 74, 219 S. W. 2d 340, 342).

The Howard case resulted from an agreement made with the Brotherhood of Railroad Trainmen providing that effective April 1, 1946, the practice of train porters performing work commonly recognized as brakemen's duties will be discontinued. When the Frisco attempted to place this agreement into effect, a restraining order was issued. Appeals from the decision therein was taken by plaintiffs and the Frisco to the United States Court of Appeals for the Eighth Circuit, bearing that Court's Nos. 13,899 and 13,900. The appeal of the Frisco is limited to the holding of the lower court that the Frisco was required under the Railway Labor Act (45 U. S. C. A. 152—seventh and 156) to give 30 days' notice to the train porters. The holding by the Supreme Court of Missouri in the case below rules, in substance, to the same effect. Oral argument in the Howard Case was had on September 16, 1949.

The scope of the instant case is narrow by comparison with that involved in the Howard Case and the Tillman and Bibbs cases referred to on page 21 of the petition herein, and is distinguishable in fact. In the Howard Case, the Frisco, as a result of an agreement with the Brotherhood of Railroad Trainmen, undertook to discontinue all train porter positions (Howard Case, 72 F. Supp. 695, 699).

In the instant case, Frisco, in order to care for its employment needs on trains Nos. 9 and 10, on and after May

14, 1948, posted bulletins for "brakemen-baggagemen" and also "chair car porters" (Opinion below, R. 73). This meant that the head-end braking work (previously performed by train porters as part of their duties) on said trains would be performed by an employee of the brakeman class, who would also handle baggage on said trains; and that the remainder of the work performed by train porters would be performed by the "chair car porters."

The arrangement was not put into effect because of the restraining order issued May 13, 1948, by Harry F. Russell, Judge, Circuit Court of City of St. Louis, Missouri (R. 10-11), as a result of petition filed in said court on the same day by J. V. Bagley and Cleveland Tillman, plaintiffs, against Frisco, defendant, and the subsequent temporary injunction issued by said Judge on July 17, 1948 (R. 13-14).

POINTS OF FACT AND OF LAW AND GROUNDS URGED IN ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

A jurisdictional labor dispute exists and the Supreme Court of Missouri properly held that such dispute was not determinable by the courts.

General Committee, etc., v. Missouri-Kansas-Texas R. Co. (C. C. A. 5), 132 F. 2d 91, 94, 320 U. S. 323, 334-335;

Order of Railway Conductors v. Pitney et al., 326 U. S. 561;

Order of Railroad Telegraphers et al. v. New Orleans, Texas & Mexico Ry. Co. et al. (C. C. A. 8), 156 F. 2d 1, cer. den. 329 U. S. 758;

Missouri-Kansas-Texas R. Co. v. Randolph (C. C. A. 8), 164 F. 2d 4, cer. den. 334 U. S. 818.

II.

The Railway Labor Act has been upheld as constitutional, and the forebodings as to possible adverse decision if matter is submitted to National Railroad Adjustment Board are not proper grounds for judicial review.

45 U. S. C. A. 151 et seq.;

Virginian Ry. Co. v. System Federation No. 40, 300 U. S. 515;

Washington Terminal Co. v. Boswell, 124 F. 2d 235, affmd. 319 U. S. 732-733;

Hampton v. Thompson (C. C. A. 5), 171 F. 2d 535, 538;

Order of Railway Conductors v. Swan, 329 U. S. 520.

ARGUMENT.

I.

The Supreme Court of Missouri Properly Held That a Jurisdictional Labor Dispute Existed and That Such Dispute Was Not Determinable by the Courts.

The record in a proceeding in prohibition is somewhat meager (as here), since the determination of whether prohibition lies is based primarily on the pleadings and orders therein. Enough is, however, contained therein to clearly indicate the existence of a jurisdictional dispute.

The Bill in Equity contains the following specific allegations:

> "10. Plaintiffs state that it is the intention of the defendant railroad, effective with the first run of Train No. 9 from St. Louis on May 14, 1948, to relegate plaintiffs and others similarly situated on runs 9 and 10 to pure menial work, and to fulfill an arrangement made with the white Brotherhood of Railroad Trainmen to turn over the head-end brakemen jobs to white men on other runs as well; that once white men take over as baggage-brakemen on runs now handled by so-called 'train porters' and perform the functions of plaintiffs and others similarly situated, they will insist upon such jobs as a matter of right and as recognition of their claim that white men who are called 'brakemen' are entitled exclusively to braking jobs despite the fact that both white and negroes perform and are capable of performing the same work" (R. 7).

Additionally, in the Motion to Intervene, filed by the General Chairman of the Brotherhood of Railroad Trainmen in the trial court, it is stated:

"3. Applicant states that it is now and at all times has been the settled policy of the Brotherhood of Railroad Trainmen that in the employment of brakemen and baggagemen by the defendant Railway, only such persons may be employed who are covered by the contracts in force between the Brotherhood of Railroad Trainmen and said Railway and who are entitled to such employment by their seniority as provided in said contracts. That this is in accord with the common practice in the railroad industry and is generally recognized and followed by defendant Railway Company. That Plaintiffs, on this action, seek to have the Court order and decree that they, and others similarly situated, are entitled to such employment contrary to the rights of this Applicant and the entire membership of the Brotherhood of Railroad Trainmen as established by contract and custom."

"5. Applicant states that he is a necessary party to this action and that his intervention herein is indispensable to the preservation of his rights and the rights of the Brotherhood of Railroad Trainmen" (R. 18-19).

It is clear from these pleadings, the facts contained in the opinion below (R. 77-78), and the facts contained in the Howard case, supra, that two groups of Frisco employees ("brakemen" on the one hand and "train porters" on the other) are vieing with each other and their employer for the right to perform certain work, i. e., the braking work and the handling of baggage at the head-end of Frisco trains Nos. 9 and 10.

This is a so-called jurisdictional dispute, where the claimed rights of two crafts overlap, necessitating "a determination of the point where the authority of one craft ends and the other begins." General Committee, etc. v.

Missouri-Kansas-Texas R. Co. (C. C. A. 5), 132 F. 2d 91, 94; 320 U. S. 323, 334-335.

In Order of Railway Conductors v. Pitney, et al., 326 U. S. 561, this Court had under consideration a "jurisdictional dispute involving the railroad and two employee accredited bargaining agents." Each union claimed that its agreement entitled it to supply conductors for five daily freight trains operated within a yard of the railroad. The O. R. C. represented road conductors, who ordinarily operate trains outside the yards and the Brotherhood of Railway Trainmen (B. R. T.) represented yard conductors, who ordinarily operate trains inside yards. Over years the practice has been that at times yard conductors manned some trains outside the yards and road conductors manned some trains within the yards. In 1940 the railroad agreed that thereafter only road conductors would man the outside trains; however, O. R. C. conductors continued to man the five trains inside the yard. In 1943 "the railroad was prevailed upon by the B. R. T. to agree to substitute B. R. T. yard conductors for the O. R. C. conductors operating these five trains."

The O. R. C. brought suit to enjoin the carrying out of that arrangement. At page 566 of the opinion, the Court said:

> "* * * We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O. R. C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. See Brown Lumber Co. v. L. & N. R. Co., 299 U. S. 393, 396. Great Northern R. Co. v. Merchants Elevator Co., 259 U. S. 285, 291. For O. R. C.'s agreements with

the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then. See Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 483-484; Burford v. Sun Oil Co., 319 U. S. 315. Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time, O. R. C. can not show irreparable loss and inadequacy of the legal remedy. The court of equity should, therefore, in the exercise of its discretion stay its hand. Lawrence v. St. Louis-San Francisco R. Co., 274 U. S. 588, 592-3, and other cases cited in Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 51, n. 9; Natural Gas Co. v. Slattery, 302 U. S. 300.

"* * * But the court should not have interpreted the contracts for purposes of finally adjudicating the dispute between the unions and the railroad. * * *"

Order of Railroad Telegraphers et al. v. New Orleans, Texas & Mexico Ry. Co. et al., (C. C. A. 8), 156 F. 2d 1, also involved a jurisdictional dispute. There the O. R. T. and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (B. R. C.) were accredited bargaining agents for their respective crafts. The controversy concerned the interpretation and

application of collective bargaining contracts of the two unions to positions and work performed by the telegraphers' craft on the one hand and the Clerks' craft on the other. The O. R. T. contended that the telegrapher craft may do both telegraphic and clerical work while the B. R. C. contended that, except for clerical work incidental to certain positions, all clerical work is covered by its contracts. The boundary line between the functions of the two crafts was not clearly defined in the contracts.

The O. R. T. brought action for declaratory judgment and for injunctive relief against the taking away of work from its members. The District Court dismissed the petition, 61 F. S. 869, and plaintiffs appealed. The Circuit Court found that if the contracts were to be interpreted and applied as the unions claimed, l. c. 3:

> "then the jurisdiction of the two unions overlap and there exists an undetermined zone of clerical work at the stations on the lines of the defendant carriers jurisdiction over which is claimed by each union and which is the subject of this controversy."

Following the doctrine of the Pitney case, supra, the Circuit Court held, l. c. 5:

> "The judgment dismissing both Counts of the petition will be vacated and the court is instructed to stay its decision until a reasonable opportunity is given for an application to the Adjustment Board for an interpretation of the telegraphers' agreement, and the case is remanded for such further proceedings as the facts may warrant."

Certiorari was denied by this Court (329 U. S. 758).

The doctrine in the Pitney case was also followed in Missouri-Kansas-Texas R. Co. v. Randolph (C. C. A. 8), 164 F.

2d 4, certiorari denied, 334 U. S. 818, a case involving train porters' claims to certain passenger train work.

The Supreme Court of Missouri, therefore, properly held that a jurisdictional labor dispute existed and that such dispute was not determinable by the courts.

II.

The Petition Is Based on Forebodings as to the Possible Decision of the National Railroad Adjustment Board if the Matter Is Submitted to That Body.

The Railway Labor Act, 45 U. S. C. A. 151, et seq., has been held to be constitutional as a valid exercise of congressional power to regulate interstate commerce. Virginian Railway Co. v. System Federation No. 40, 300 U. S. 515. See also Washington Terminal Co. v. Boswell, 124 F. 2d 235, affirmed per curiam by an equally divided court, 319 U. S. 732-733.

A study of the petition clearly shows that it is based on forebodings of "things to come". It is bottomed on the premise that if the matter is submitted to the National Railroad Adjustment Board plaintiffs below, as well as other train porters employed by Frisco, will be denied certain claimed constitutional and statutory rights, because the First Division of that Board is so "geared and manned" (Pet. p. 22).

Congress, in enacting the Railway Labor Act, provided that the Adjustment Board should consist of thirty-six members, eighteen of whom are to be selected by labor organizations of employes "national in scope" [45 U. S. C. A. 153-First (a)]. Of these, five were assigned to the First Division of that Board [Subsec. (h) idem.]. The Third Division of that Board, for instance, has 5 employe

representatives selected by "national organizations". It has jurisdiction over many groups of employes, and according to the Fourteenth Annual Report of the Mediation Board for the Fiscal year ended June 30, 1948 (page 75), ten different unions were parties to cases docketed in that division. Obviously, 5 of such unions had no representation on that Division. That same report indicates that the Second and Fourth Divisions, having 5 and 3 employe members, respectively, have cases docketed by more unions than have representatives on the Division (Idem. pp. 73, 76). The report as to the First Division does not state this information as to "unions" docketing cases before that division. But it becomes obvious that the situation here complained of, i. e., that plaintiffs' collective bargaining representative or union has no representation on the Board, is not unique.

Prejudice, because of union affiliation, is alleged against the employe members of the First Division (Pet. pp. 20, 34 et seq.). This emphasizes the anticipatory character of the grounds on which certiorari is here sought. Such grounds are untenable. cf. Hampton v. Thompson, C. C. A. 5, 171 F. 2d 535, l. c. 538-539.

On page 21 of his petition, petitioner (footnote 8) states that challenge has been filed with the First Division and that if the challenge is denied, the action of the Division "will have to be attacked collaterally by the extraordinary writs". Further, if the challenge is upheld, then, it is alleged the "state of administrative frustration" will be reached.

When that state of "frustration" has been reached, **and not before**, is the appropriate time for judicial action. cf. Order of Railway Conductors v. Swan, 329 U. S. 520. In that case, the question to be resolved was whether the First

Division or the Fourth Division had jurisdiction of dispute involving yardmasters. Said the Court, l. c. 524-525:

> "In other instances, **we have left the problem of jurisdiction to be determined in the first instance by the administrative agency.** Myers v. Bethlehem Corp., 303 U. S. 41. But here both the First and the Fourth Divisions of railroad and labor representatives, appear hopelessly divided on the jurisdictional issue, making a determination impossible. **Judicial guidance at this state is justified as long as such a condition exists.**" (Emphasis supplied.)

Nor is there here present an "obliteration of Federal civil rights and job rights established under the Railway Labor Act," since the Missouri Supreme Court kept plaintiffs in status quo by permitting the temporary injunction to remain in effect,

> "enjoining taking away from plaintiffs their present job functions on any trains or replacing them with baggagemen-brakemen, which may be continued pending determination of the jurisdictional, classification and representation questions by the Boards established by the Railway Labor Act or for a reasonable time to invoke the jurisdiction of those Boards" (R. 80-81).*

Clearly, the state of administrative frustration and the denial of constitutional and statutory rights are *in futuro* and not *in praesenti*, stamping recourse to this court as premature on that premise.

---

* This part of the holding is based on the failure to give 30 days notice under the Railway Labor Act (R. 79). Respondent does not agree with that premise. A similar holding in the Howard Case, supra, is the sole subject matter of Frisco's appeal therein. That appeal was pending at the time of the decision below, and is still pending, before the United States Court of Appeals for the Eighth Circuit.

CONCLUSION.

Wherefore, it is respectfully suggested that the petition for writ of certiorari herein be denied.

Respectfully submitted,

EUGENE G. NAHLER,
CORNELIUS H. SKINKER, JR.,
ALVIN J. BAUMANN,
906 Olive Street,
St. Louis 1, Missouri,
Attorneys for Respondent, St. Louis-San Francisco Railway Company.